91-318 (1)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWIN S. LELAND,

Petitioner,

v.

FEDERAL INSURANCE ADMINISTRATOR AND
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the Upton-Jones Amendment, 42 U.S.C.A. § 4013(c), to the National Flood Insurance Program (42 U.S.C.A. § 4001, et seq.), provide coverage for plaintiff's flood relocation claim, which initially arose prior to passage of the Amendment?

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REPORTS BELOW

This petition seeks review on Writ of Certiorari from the decision of the United States Court of Appeals for the Fourth Circuit, recorded at _____ F.2d. _____, No. 90-3074 (4th Cir., May 22, 1991) (1991 WL 83142), which affirmed the order of the United States District Court for the Eastern District of North Carolina in an unreported opinion, No. 88-120-CIV-7-BR (March 23, 1990). Both decisions are appended hereto.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment entered on May 22, 1991 by the United States Court of Appeals for the Fourth Circuit. Jurisdiction is conferred on this court by 28 U.S.C.A. § 1254(1) (West Supp. 1991).

STATUTES AND REGULATIONS

42 U.S.C.A. § 4013 (West 1977 and Supp. 1991)

STATEMENT OF THE CASE

Plaintiff, Colonel Edwin S. Leland (Ret.), instituted this action on November 21, 1988, against the Federal Insurance Administrator ("FIA") for breach of a flood insurance contract to recover the cost of relocation occasioned by the imminent collapse of his residence at Topsail Beach, North Carolina. Plaintiff filed an amended complaint adding defendant United Services Automobile Association ("USAA") on January 11, 1989. After disposition of certain preliminary motions and the conclusion of discovery, all parties moved for summary judgment. The trial court heard arguments on these motions on February 21, 1990. Judgment granting defendants' motions for summary judgment and denying plaintiff's motion for summary judgment was entered on March 23, 1990 by the district court and affirmed by the United States Court of Appeals for the Fourth Circuit on May 22, 1991.

Defendant FIA is the official in the Federal Emergency Management Agency ("FEMA") who administers the National Flood Insurance Program ("NFIP"). Defendant USAA issued a Write Your Own Policy ("WYOP") for flood insurance under the NFIP to plaintiff. Defendants denied any liability to plaintiff under the policy, and defendant USAA filed a cross-claim for indemnity against defendant FIA for denying plaintiff's claim without notice to USAA.

On March 23, 1985, Colonel and Mrs. Edwin Leland renewed the flood insurance policy on their vacation home at 1505 Ocean Boulevard, Topsail Beach, North Carolina, for a period of three years. The full premium of $842 for the three-year term was paid at that time. Coverage was issued by USAA, policy number 0023771-90F, under the provisions of the National Flood Insurance WYOP program. The policy is a single peril policy that protects homeowners living in coastal areas from losses due to flooding. It is subsidized by the federal taxpayer. An insured deals with his own insurance company for payment of policy premiums and filing of claims, and the company in turn is partially reimbursed for losses by the federal government. The NFIP is codified at 42 U.S.C.A. § 4001, et seq. The terms and conditions of the policy are mandated by the federal government and are published at 44 C.F.R., Part 61, App.(A)(1). Relocation cost is not covered.

Violent and unusual winter storms battered coastal North Carolina and Topsail Beach on December 2, 1986, January 1, 1987, and February 27, 1987. The Leland residence suffered substantial flood damage to its heating and electrical system, foundation pilings, and septic tank. In addition, these storms washed away large parts of the beach in front of plaintiff's residence. By February, salt water had intruded into the septic tank, making it unusable. The deck of the Leland

residence was also severely damaged by waves and was in danger of collapsing. The support pilings were eroded and underwashed by the flooding.

On March 17, 1987, the Topsail Beach building inspector initiated condemnation proceedings against plaintiff's residence. He outlined the problems with the residence and declared it unfit in its present state for further habitation. Throughout the summer of 1987, plaintiff attempted in vain to support the pilings, but the loss of beach sand from the flooding could not be arrested. Ocean waves continued to erode and underwash the support pilings. In early November 1987, the city manager of Topsail Beach declared the Leland residence in danger of imminent collapse. Faced with this peril, plaintiff decided to move his house to avoid a complete loss.

Plaintiff owned a lot across the street behind his house further removed from the beach. He prepared that site and began the relocation of his home on November 16, 1987. The move involved setting pilings at the new location, lifting the house off its foundation and setting it onto its new supports. After this was completed, the electrical system, telephone, cable, and other services had to be reinstalled. This required several months of work. The septic tank was installed and the

residence was finally approved for reoccupancy on February 8, 1988.

While plaintiff was battling the elements in 1987, a bill was pending in Congress to amend the NFIP. The Upton-Jones Amendment (or the "Amendment") was proposed in an effort to broaden the coverage of the NFIP and reduce claims paid under that program. The Amendment was designed to pay for the relocation of houses in imminent danger of collapse or damage from flood action. Since relocation cost was generally cheaper than paying for a destroyed residence, the Amendment was hailed as a cost-saving measure. It was signed into law on February 5, 1988, and is codified at 42 U.S.C.A. § 4013(c). The statute itself operates as the additional insurance coverage and no separate policy was issued to policyholders for this new protection.

Shortly after his forced relocation, plaintiff submitted his proof of loss to FEMA. He sought reimbursement for approximately $25,000 in actual relocation expenses. Since the dwelling was insured against total loss in the sum of $84,000, plaintiff's house move saved the government $59,000. On July 5, 1988, FEMA denied his claim on three grounds. The agency first stated that since the relocation took place before the Amendment was passed, plaintiff was not covered. Second, FEMA contended that the property had not been

condemned by local authorities, as required by the Amendment. Third, FEMA stated that the building was voluntarily moved without state or local condemnation action. Plaintiff timely filed suit within the one-year period. Jurisdiction arose under 42 U.S.C. §§ 4072 and 4503.

ARGUMENT

THIS COURT SHOULD REVIEW WHETHER THE UPTON-JONES AMENDMENT TO THE NFIP WAS INTENDED TO PROVIDE COVERAGE FOR PLAINTIFF'S FLOOD RELOCATION CLAIM.

This case presents the question of whether the Upton-Jones Amendment to the NFIP was intended by Congress to provide limited coverage for a flood relocation claim incurred prior to final passage of the Amendment. The Court of Appeals erred by ruling that such retroactive effect was not intended by the plain language of the legislation. The court's holding is contrary to the wording of the statute and the legislative intent expressed by the United States Congress. The ruling also ignores Federal common law and offends traditional notions of fairness and equity. This important question of federal law, which potentially affects scores of homeowners, has never been addressed by this Court, and the decisions of the lower courts in this case are the first in this area of law and are without precedent in any other circuit.

The Amendment is part of an insurance policy issued pursuant to the NFIP. Since that policy is a creature of federal statute, federal common law governs its interpretation. Sadowsky v. National Flood Ins. Program, 834 F.2d 653, 655 (7th Cir. 1987)(citing Hanover Bldg. Materials v. Guiffrida,

748 F.2d. 1011, 1013 (5th Cir. 1984)) and Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131 (1st Cir. 1984). Under federal common law, if language in an insurance policy is reasonably open to alternative constructions, the one more favorable to the insured will be adopted. As this court has said:

> The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policyholder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted . . . .

Aschenbrenner v. United States Fid. & Guar. Co., 292 U.S. 80, 84-85, 54 S.Ct. 590, 592-93, 78 L.Ed. 1137, 1140 (1934). The courts below, when confronted with a statute that is also an ambiguous insurance policy, incorrectly construed the policy against the plaintiff.

The Upton-Jones Amendment was enacted on February 5, 1988. Plaintiff began relocation of his house on November 16, 1987, and completed it on February 8, 1988. Plaintiff only began relocation after he was unable to arrest ocean erosion from flood damage and his home was declared in danger of imminent collapse by the city manager of Topsail Beach. The Amendment states in part that "the provisions of this sub-section shall apply to contracts for flood insurance

under this title that are in effect on or entered into after, February 5, 1988" (Section 4013(c)(4)(A)). The relevant legislative history states in part:

> The House provision restricted applicability of these provisions to flood insurance policies effective on or entered into after the enactment of this act and to structures covered by insurance on the date of certification.
>
> . . .
>
> The Conference Report incorporates the House provision . . . .

House Conf. Rep. No. 100-426, 1987 U.S. Code Cong. and Admin. News 3458, 3534.

The Upton-Jones Amendment was passed as a cost saving measure to take care of exactly the type of case presented by plaintiff. Prior to this Amendment, a homeowner could not move his residence if it was in danger of collapsing due to flooding; rather, he had to wait until the residence actually collapsed. The Amendment permits a homeowner to move his residence if it is in danger of collapsing due to a

flood. As Representative Jones, one of the Amendment's sponsors, stated:

> Not only does the provision make good financial sense, it makes good common sense. Under the existing NFIP, property owners across the Nation are often put in a very difficult position. As erosion brings the water every (sic) closer to their home or business, they are faced with a catch-22 situation. Even though the structure is doomed to collapse, they cannot receive any payment until the damage actually occurs. They must sit helplessly by and await the inevitable. They could, of course, relocate the structure, but they would have to pay out of their own pocket. It doesn't take a mathematics scholar to figure out what the vast majority will do. They will let the structure fall and collect insurance for a total loss.

133 Cong. Rec. E4546-03 (1987) (statement of Representative Jones).

Plaintiff, contrary to what Representative Jones felt most homeowners would do, refused to let his home fall and collect the $84,000 at which it was valued. He did not wait for it to collapse into the ocean and then file a claim against the government. Rather, he moved his home at a cost of about $25,000, thus saving the government almost $60,000 by relocating it before it was destroyed. This is exactly the type of initiative that the Upton-Jones Amendment was designed to encourage.

Relying on prior pronouncements of this and other counts which disfavor retroactive application of statutes absent express statutory sanction, the lower courts ignored the plain fact that plaintiff had a policy in effect on the date of the Amendment. Finding this fact insufficient to warrant coverage, the Fourth Circuit opinion relegates to a footnote its observation that the court must apply the law in effect at the time, "absent manifest injustice." (n. 7, A-13). It is manifestly unjust for the government to be allowed to bilk plaintiff out of coverage simply because he saved it some money.

Both the trial and appellate courts ignored the expressions of Congressional intent cited, as well as the federal common law, in ruling that the Amendment had no retroactive application. To the contrary, both the Amendment and its legislative history as demonstrated by Representative Jones, express Congress' intent that there be limited retroactive effect for claims such as plaintiff's. Colonel Leland met all the conditions of the Amendment. His flood insurance policy was written on March 23, 1985 for a period of three years and was paid in full on that date. This policy was effective on February 5, 1988 and had been in effect for more than two years as of June 1, 1988. Plaintiff also showed that his property was properly certified as subject to condemnation by the town of Topsail Beach. This is sufficient to show that

plaintiff complied with all requirements for 42 U.S.C.A § 4013(c)(6).

Plaintiff acted reasonably in relocating his house prior to its imminent destruction by the ocean. Colonel Leland is not looking for a windfall; he saved the federal government almost $60,000 by relocating his residence before it was destroyed. The trial and appellate courts disregarded the evidence presented by plaintiff and dismissed his arguments out of hand on summary judgment. This Court should grant certiorari on this novel issue of federal law and find that the Upton-Jones Amendment to the NFIP has limited retroactive effect for NFIP policies in effect when it passed.

Respectfully submitted,

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APPENDIX

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(5-22-91)

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42 U.S.C.A. § 4013(c) (West Supp. 1991)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3074

EDWIN S. LELAND,

Plaintiff - Appellant,

versus

FEDERAL INSURANCE ADMINISTRATOR, UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. W. Earl Britt, District Judge. (CA-88-120-7-CIV)

Argued: January 9, 1991 Decided: May 22, 1991

Before SPROUSE and WILKINSON, Circuit Judges, and COPENHAVER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Copenhaver wrote the opinion, in which Judge Sprouse and Judge Wilkinson joined.

ARGUED: Grover Gray Wilson, PETREE STOCKTON & ROBINSON, Winston-Salem, North Carolina, for Appellant. Ellen Maren Neubauer, FEDERAL EMERGENCY MANAGEMENT AGENCY, Washington, D.C.; Francis Boyd Prior, CROSSLEY, MCINTOSH & PRIOR, Wilmington, North Carolina, for Appellees. **ON BRIEF:** Urs R. Gsteiger, PETREE STOCKTON & ROBINSON, Winston-Salem, North Carolina, for Appellant. Sharon J. Stovall, CROSSLEY, MCINTOSH & PRIOR, Wilmington, North Carolina; Margaret Person Currin, United States Attorney, Steven A. West, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

COPENHAVER, District Judge:

Edwin S. Leland ("Leland") appeals from the district court's grant of summary judgment in favor of the Federal Insurance Administrator ("FIA") and the United States Automobile Association ("USAA"), asserting that he is entitled to summary judgment on his claim for benefits under the 1988 Upton-Jones amendment to the National Flood Insurance Act, 42 U.S.C. § 4013(c) (the "amendment"). The district court denied summary judgment to Leland and granted summary judgment to the defendants, holding that Leland's losses occurred prior to the effective date of the Upton-Jones amendment and that the amendment did not apply retroactively to cover his losses. We agree and affirm the judgment of the district court.

I.

Appellant Leland is the owner of a beachfront residence at Topsail Beach, North Carolina. In March, 1985, defendant USAA issued to Leland a standard flood insurance policy ("SFIP") on his Topsail Beach property pursuant to the National Flood Insurance Program ("NFIP"). Defendant Federal Insurance Administrator ("FIA") is the official in the Federal Emergency Management Agency ("FEMA") who administers the NFIP.

The policy issued to Leland in 1985 was a single peril policy designed to protect homeowners living in coastal areas from certain enumerated losses due to flooding. The policy, as issued, provided coverage only for "direct physical loss by or from a flood." See 44 C.F.R. Part 61, App. A(1), Art. III.[1] There is no dispute between the parties to this action that the policy as issued in 1985 did not afford coverage, as sought by the plaintiff, for the physical relocation of an insured dwelling which had sustained structural damage due to flooding.

Severe winter storms battered coastal North Carolina, including the Topsail Beach area, in December, 1986, and in January and February, 1987. Leland contends that the high winds, waves and tides during those storms resulted in conditions of flooding as defined by the flood insurance policy issued to him.[2] He further contends that, as a result of each

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[1]"Direct physical loss by or from a flood" is defined in the standard flood insurance policy as "any loss in the nature of actual loss of or physical damage evidenced by physical changes to the insured property (building or contents . . .) which is directly and proximately caused by a 'flood'. . . ." 24 C.F.R. Part 61, App. A(1), Art. II.

[2]"Flood" is defined in the standard flood policy as follows:

> Wherever in this policy the term "flood occurs, it shall be held to mean

(continued...)

of the floods in December, 1986, and January and February, 1987, he sustained substantial damage to the heating, electrical and septic systems, and to the foundation, pilings and deck of his residence.

On or about March 17, 1987, Leland was advised in writing by Topsail Beach officials that, because of the damage to his residence from the severe winter storms and the under-washing and erosion of the land underlying the property, the residence was unfit for human habitation and, further, that

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[2](...continued)

A. A general and temporary condition of partial or complete inundation of normally dry land areas from:

1. The overflow of inland or tidal water.

2. The unusual and rapid accumulation or runoff of surface waters from any source.

3. Mudslides (i.e. mudflows) which are proximately caused by flooding as defined in paragraph A-2 of this article and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, including your premises, as when earth is carried by a current of water and deposited along the path of the current.

B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the cyclical levels which result in flooding as defined in A-1 above.

44 C.F.R. Part 61, App. A(1), Art. II (1987).

condemnation proceedings were being initiated. Subsequently, in November, 1987, Leland was warned by city officials that the residence was in danger of imminent collapse.

In light of these warnings and fearful of imminent collapse, Leland relocated his residence to a lot which he owned across the street and which was further removed from the beachfront. The relocation commenced on November 16, 1987. Although physical movement of the dwelling was completed in November, 1987, the residence was not ready for occupancy until the septic tank was installed and approved on February 8, 1988.

After relocation of his residence, Leland submitted a claim for relocation costs of approximately $25,000 to FEMA. The claim was denied on the ground that relocation of the dwelling was not compensable under the standard flood insurance policy held by Leland at the time of loss. Denial of the claim was also predicated upon FEMA's contention that the February 5, 1988, amendment to the SFIP which provides benefits for structural relocation of flood-damaged structures was not retroactive and would not afford coverage for relocations occurring prior to its enactment.[3]

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[3]The Administrator also determined that, even if the amendment were retroactive in operation, there would be no coverage for (continued...)

After denial of his claim for relocation expenses, Leland filed this action against the Federal Insurance Administrator and, subsequently, against USAA.

II.

Inasmuch as the flood insurance policy issued to Leland in 1985 and in effect at the time his residence was relocated in November, 1987, provided coverage only for "direct physical loss by or from a flood," both the insurance administrator at the claims level, and the district court in the proceedings below, determined that the relocation of Leland's residence was not a covered loss under the policy provisions in effect at the time of the relocation in November, 1987.[4] Leland does not contest the district court's ruling in this regard.

Leland asserts, however, that the Upton-Jones amendment to the National Flood Insurance Act, which was enacted

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[3](...continued)
Leland's loss inasmuch as the property had not been condemned by the local land use authority. The administrator also noted that the residence had been voluntarily moved despite no state or local condemnation action having taken place. In view of the disposition of other issues on this appeal, it becomes unnecessary to address either of these contentions.

[4]Whether coverage under the standard flood insurance policy for the structural damage done to Leland's residence would have existed but for the relocation is not before the court and we do not undertake to pass upon that issue here.

and became effective on February 5, 1988, affords him coverage under the Act for expenses incident to the relocation of his residence.[5] He contends that the district court erred in its decision that the Upton-Jones amendment is not retroactive in application and in its determination that his loss occurred prior to the amendment's effective date of February 5, 1988.

III.

The Upton-Jones amendment to the National Flood Insurance Act, 42 U.S.C. § 4013(c), was enacted in order to provide coverage under the National Flood Insurance Act for the relocation or demolition of flood-damaged structures determined to be subject to imminent collapse. The amendment states in pertinent part:

> (1) If any structure covered by a contract for flood insurance under this subchapter and located on land that is along the shore of a lake or other body of water is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, the Director shall (following final

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[5]The amendment at issue derived from the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 544(b), 101 Stat. 1972 (Feb. 5, 1988). Section 544(b) provides that "[T]he amendment made by this section shall become effective on the date of enactment of this Act." Id.

determination by the Director that the claim is in compliance with regulations developed pursuant to paragraph 6(A)) pay amounts under such flood insurance contract for proper demolition or relocation.

42 U.S.C. § 4013(c)(1) (1988).[6]

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[6]The amendment further provides:

(2) If any structure subject to a final determination under paragraph (1) collapses or subsides before the owner demolishes or relocates the structure and the Director determines that the owner has failed to take reasonable and prudent action to demolish or relocate the structure, the Director shall not pay more than the amount provided [by the mathematical formula set forth] in subparagraph (A)(i) with respect to the structure.

. . . .

(4)(A) The provisions of this subsection shall apply to contracts for flood insurance under this title that are in effect on, or entered into after, February 5, 1988.

(B) The provisions of this subsection shall not apply to any structure not subject to a contract for flood insurance under this title on the date of a certification under paragraph (1).

(C) The provisions of this subsection shall not apply to any structure unless the structure is covered by a contract for flood insurance under this subchapter ---

(i) on or before June 1, 1988;

(ii) for a period of two years prior to certification under paragraph (1); or

(continued...)

No reported cases specifically address whether enactment of § 4013(c) should be given retroactive effect, nor does the amendment itself expressly provide for retroactive application. It is a fundamental and well established principle of law, however, that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation. See, e.g., Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); Bennett v. New Jersey,

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[6](...continued)

> (iii) for the term of ownership if less than two years.
>
> . . . .
>
> (6)(A) The Director shall promulgate regulations and guidelines to implement the provisions of this subsection.
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> (B) Prior to the issuance of regulations regarding the State and local certifications pursuant to paragraph (1), all provisions of this subsection shall apply to any structure which is determined by the Director --
>
> > (i) to otherwise meet the requirements of this subsection; and
> >
> > (ii) to have been condemned by a State or local authority and to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels.

42 U.S.C. § 4013(c) (1988).

470 U.S. 632, 639 (1985); United States v. Magnolia Petroleum, 276 U.S. 160, 162-63 (1928).

In light of this well established principle of statutory construction, Leland argues that subparagraph (4)(A) of § 4013(c), which states that "[t]he provisions of this subsection shall apply to contracts for flood insurance under this title that are in effect on, or entered into after, February 5, 1988," warrants retroactive application of the amendment. The district court correctly noted, however, that subparagraph (4)(A) merely provides for application of the amendment to those standard flood policies which were in effect on the date of the amendment's enactment on February 5, 1988, and to those issued thereafter, without the necessity of amending such policies to reflect the new statutory coverage. Absent such a provision, it would have been necessary for FEMA to attach riders or endorsements to policies issued prior to incorporation of the new amendment into the standard flood insurance policy in order for policy holders to benefit prospectively from the amendment.

Support for the district court's interpretation of subsection (4)(A) of § 4013(c) is found within the liberalization clause of the standard flood insurance policy which was issued to Leland and which was in effect at the time of the relocation of his residence. The liberalization clause provides:

> While this policy is in force, should we have adopted any forms, endorsements, rules or regulations by which this policy could be broadened or extended for your benefit by endorsement or substitution of policy form, then, such matter shall be considered to be incorporated in this policy without addition premium charge and shall inure to your benefit as though such endorsement or substitution has been made.

44 C.F.R. par. 61, App. (A)(1), Art. IX. (1988).

Other courts which have considered the effect of the liberalization clause in standard flood insurance policies have held that, rather than providing for retroactive application of amendments to FEMA, the clause is designed to foster administrative convenience and efficiency. As the Eighth Circuit recently held in Criger v. Becton:

> We are convinced the SFIP liberalization clause was intended merely to give the insured the benefit of favorable changes made by FEMA during the policy term. The clause fosters administrative efficiency by allowing FEMA to give an insured the benefit of an amendment without requiring each SFIP to be rewritten or endorsed every time FEMA makes a change. The liberalization provision does not give retroactive effect to new SFIP terms; rather, it serves as a device for automatically reading into existing policies beneficial changes as soon as FEMA makes them and declares them to be in force.

902 F.2d 1348, 1352 (8th Cir. 1990).

In Bowen v. Georgetown University Hospital, the Supreme Court recently reaffirmed the longstanding principles relative to the retroactive application of statutory enactments and administrative rulemaking and held that, even where some substantial justification for retroactivity is presented, courts should be reluctant to find such authority absent an express statutory grant. 488 U.S. 204, 208-209 (1988).[7] The Bowen Court held: "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language

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[7]Although Leland has not so argued, some litigants seeking retroactive application of other amendments to FEMA have asserted, unsuccessfully, that retroactivity is warranted under the principles set forth in the earlier Supreme Court decision of Bradley v. Richmond School Board, 416 U.S. 696 (1974). See, e.g., Wright v. Director, Federal Emergency Management Agency, 913 F.2d 1566, 1572-74.

In Bradley, the Court held that a statutory provision for attorneys' fees should be retroactively applied to a fee request pending when the statute was enacted. Bradley premised its holding upon the principle that a court must apply the law in effect at the time it renders it decision, absent manifest injustice, statutory direction or legislative history to the contrary. 416 U.S. at 715.

Even under the Bradley approach, however, retroactivity is not warranted in the present case inasmuch as application of the amendment would result in manifest injustice by distorting the rights of the respective parties already fixed by the policy provisions in effect prior to February 5, 1988.

requires this result." Id. at 208, citing Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Comm'r, 323 U.S. 141, 164 (1944); Miller v. United States, 294 U.S. 435, 439 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928).

The Bowen decision and the principles articulated there have been cited and relied upon recently by other circuits in cases arising under the National Flood Insurance Act. See Criger v. Becton, 902 F.2d 1348 (8th Cir. 1990); Wright v. Director, Federal Emergency Management Agency, 913 F.2d 1566 (11th Cir. 1990). These cases have consistently recognized that, in accordance with Supreme Court precedent, statutory enactments or amendments "are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." Criger, 902 F.2d at 1354; Wright, 913 F.2d at 1574, citing United States v. Magnolia Petroleum, 276 U.S. at 162-63.

As in both the Criger and Wright cases which determined that other recent amendments to the National Flood Insurance Act should not be applied retroactively, the status of Leland's claim in the present case was "fixed" at the time he

chose to relocate his home by policy provisions then in effect.[8] Moreover, like the amendments at issue in Criger and Wright, an intent for retroactive application of the amendment at issue is discernable from neither the language of the amendment itself nor from any other indication of congressional intent.

For these reasons, the district court properly ruled that the Upton-Jones amendment to the National Flood Insurance

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[8]In Wright, the Eleventh Circuit noted:

> Wright entered into a contractual relationship with FEMA when he signed consecutive insurance policies under the Program. The policies were for fixed terms, and Wright was obligated to pay a yearly premium. Each party was bound to comply with the explicit terms of the policies. Based on the terms of the policy, the federal government established premium rates, estimated the cost of the program, and determined its contours of liability. It acted, like a private insurance company, according to the terms of the contracts entered into in 1985 and 1986. . . . [S]uch a relationship created unconditional and matured rights upon which the parties relied. Retroactive application of the October Amendment would deny both the federal agency and Program participants "fixed, predictable standards for determining if expenditures are proper." Further . . . there are comparable "practical considerations related to the administration of" an insurance program . . . which necessitate obligations being generally determined by the policy terms in effect at the time Wright was actively insured under a SFIP.

913 F.2d at 1574 (emphasis in original) (citations and footnotes omitted).

Act, 42 U.S.C. § 4013(c), did not apply retroactively to cover the costs incurred by Leland in the relocation of his residence.

IV.

Leland also asserts that, even if the amendment does not apply retroactively, the amendment nonetheless affords coverage for his claim for relocation expenses. He contends that his "loss," assertedly the relocation of his residence, was not complete until February 8, 1988, three days after the effective date of the amendment, when the septic tank at the relocated residence was completed and the dwelling approved for occupancy. Arguing that the amendment does not specify what event triggers coverage and that his "loss" did not occur until after February 5, 1988, Leland asserts that he should be given the benefit of coverage under the amendment by virtue of "general principles of federal law."[9]

Federal common law controls the interpretation of insurance policies issued pursuant to the National Flood Insurance Program (NFIP). See, e.g., Sodowski v. National Flood Ins.

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[9]Consistent with general principles of insurance law, federal courts have recognized that, if the language of an insurance policy is reasonably open to alternative constructions, the one more favorable to the insured should be adopted. See, e.g., Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U.S. 80, 84-85 (1934).

Program, 834 F.2d 653, 655 (7th Cir. 1987). In considering coverage questions arising under the NFIP, federal courts have recognized that, because potential exposure to claims and premium rates are estimated by FEMA in accordance with standard insurance practices, "Congress did not intend to abrogate standard insurance law principles which effect such estimates and risks." Drewett v. Aetna Cas. & Sur. Co., 539 F.2d 496, 498 (5th Cir. 1976); Sodowski, 834 F.2d at 655.

The standard flood insurance policy at issue in this case contains an exclusionary clause commonly referred to in the insurance industry as a "loss-in-progress" provision. That clause expressly states:

> We only provide coverage for direct physical loss by or from flood which means we do not cover:
>
> B. Losses of the following nature:
>
> 1. A loss which is already in progress as of 12:01 A.M. of the first day of the policy term, or as to any increase in the limits of coverage which is requested by you, a loss which is already in progress when you request the additional coverage.

44 C.F.R., Pt. 61, Art. III (1987).

It is thus seen from the provisions of Leland's own policy that prospective changes in policy coverage are not intended to encompass losses already in progress at the time such changes in coverage are implemented. Such a result is consistent with the decisions of federal courts which have uniformly held that the "loss-in-progress" principle of standard insurance law applies to policies issued pursuant to the Act, and thus have denied coverage for flooding commencing prior to the effective date of a policy but not resulting in loss until after the effective date. See, e.g., Presley v. National Flood Insurers Assoc., 399 F. Supp. 1242, 1245 (E.D. Mo. 1975); Mason Drug Co. v. Harris, 597 F.2d 886, 887-88 (5th Cir. 1979); Summers v. Harris, 573 F.2d 869 (5th Cir. 1978); Drewett, 539 F.2d at 498. Even in the absence of a "loss-in-progress" policy exclusion, federal courts have denied coverage for losses due to flooding which occurred prior to the effective date of a policy issued pursuant to the National Flood Insurance Program. See, e.g., Drewett, 539 F.2d 496; Summers, 573 F.2d 869.

In Drewett v. Aetna Cas. & Sur., an insured applied for and was issued a flood policy pursuant to the National Flood Insurance Program to cover his "camp house." Prior to and on the date the policy was issued, flood waters had risen three to four feet up the stilts which supported the structure. 539 F.2d at 497. Three days after issuance of the policy, a levee which

surrounded the property broke, allowing flood waters to enter the living quarters of the structure. Coverage was denied for the flood damage done to the residence on the basis of the "loss-in-progress" principle, with the Fifth Circuit noting:

> [A]lthough the [Flood Insurance] Program offers subsidized flood insurance, it is designed to operate much like any private insurance company. . . . Because the Program's exposure to claims and its premiums are required to be estimated in accordance with standard insurance practices, and because private insurers carry part of the risk, it is clear that Congress did not intend to abrogate standard insurance law principles which affect such estimates and risks. Nothing in the statute or regulations promulgated under it requires otherwise. . . .
>
> [T]he district court held that the "loss-in-progress" principle applies to policies issued under the Program, rejecting the same arguments made by Drewett here. This plainly is the correct conclusion. We affirm.

539 F.2d at 497-98 (citations omitted). See generally, Annotation, National Flood Insurance Risks and Coverage, 81 A.L.R. Fed. 416, 421, 434-35 (1987).

Although the "loss-in-progress" principle has been applied in cases such as Drewett, Presley, Summers and Mason to flood insurance coverage disputes which arose after the issuance of new policies of flood insurance rather than after the

expansion of benefits pursuant to a statutory amendment, the rationale underlying the rule, namely, prevention of unfair allocation of loss to the insurer whether through fraud or innocent mistake, logically applies in the statutory amendment context as well.[10] To hold otherwise, and to adopt Leland's position that coverage exists merely because incidental repairs were made after the amendment's effective date, would allow an insured to defer making such repairs to a flood-damaged structure in a purposeful effort to delay his "loss" until after enactment of future beneficial amendatory changes.

Application of the loss-in-progress principle to the facts of this case renders it apparent that there can be no coverage for Leland's claim on the theory that his loss did not occur until February 8, 1988, when the septic system at the relocated residence was installed and approved. Indeed, there is no dispute that the storms which damaged the Leland residence and which necessitated relocation of the structure and the consequent replacement of the septic system, occurred in December, 1986, and in January and February, 1987. By November, 1987, nearly three months prior to the amendment's effective date, a new site had been prepared and

---

[10]In Presley, the court noted that the "loss-in-progress" principle has developed as a matter of public policy and has, as a fundamental purpose, prevention of the perpetration of fraud in the acquisition of insurance contracts. 399 F. Supp. at 1244-45.

physical relocation of the structure to its new location had been completed.

Although installation and approval of the septic system was surely a necessary incident to the physical relocation and reinhabitation of Leland's residence, it cannot be viewed in isolation from the other chain of events, particularly the flooding allegedly producing the damage in question, which occurred well prior to the amendment's effective date of February 5, 1988. To the extent that installation of the septic system is a compensable loss under the amendment at issue, which we need not decide here, such loss was already in progress on the amendment's effective date and does not furnish a basis for coverage of Leland's claim.

V.

Accordingly, we agree with the decision of the district court granting summary judgment to the defendants and its judgment is hereby affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

EDWIN S. LELAND

Plaintiff,

CASE NO.
88-120-CIV-7-BR

v.

FEDERAL INSURANCE
ADMINISTRATOR & UNITED
SERVICES AUTOMOBILE ASSOC.

JUDGMENT IN A CIVIL CASE

[FILED MARCH 23, 1990]

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is denied. Motions by defendant for summary judgment are allowed and this action is hereby dismissed.

The above judgment was filed and entered this 23rd day of March, 1990, and copies mailed to the following:

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March 23, 1990
DATE

J. Rich Leonard
Clerk

S/
(By) Deputy Clerk
Joyce W. Todd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

EDWIN S. LELAND

Plaintiff,

CASE NO.
88-120-CIV-7-BR

v.

FEDERAL INSURANCE
ADMINISTRATOR & UNITED
SERVICES AUTOMOBILE ASSOC.

ORDER

[FILED MARCH 23, 1990]

On 17 November 1988 plaintiff Edwin S. Leland (Leland) filed this action against defendant Federal Insurance Administrator (Administrator) to recover benefits pursuant to a policy issued under the National Flood Insurance Act of 1968, 42 U.S.C. § 4001, et seq. (the Act). In an amended complaint filed on 12 January 1989 plaintiff named the United Services Automobile Association (USAA) as a defendant. Plaintiff and both defendants have filed motions for summary judgment. The matter has been fully briefed by the parties and a hearing held. It is appropriate, therefore, that a decision be rendered.

I. FACTUAL BACKGROUND

Leland, a resident of Virginia, is and was at all times relevant to this action the owner of a residence at Topsail Beach, North Carolina. On 23 March 1985 USAA, pursuant to the National Flood Insurance Write-Your-Own Program, issued Leland a Standard Flood Insurance Policy (SFIP) on his residence for a period of three years. The policy is a single peril policy that protects homeowners living in coastal areas from losses due to flooding.

On 2 December 1986, 1 January 1987 and 27 February 1987 significant storms hit the North Carolina coast, including Topsail Beach. Leland's residence, then located at 1505 Ocean Boulevard, sustained damages to the heating and electrical system, foundation pilings, deck and septic tank. Leland was advised by officials of the Town of Topsail Beach on 17 March 1987 that, because of the damages, the house was unfit for human habitation and condemnation proceedings were being initiated.

In November 1987 Leland was warned by officials of the Town of Topsail Beach that his house was in danger of imminent collapse. He thereupon moved the house to a lot which he owned across the street, 1506 Ocean Boulevard. Although the physical moving of the building was completed in November 1987 it was not ready for occupancy until 8 February 1988 when installation of a new septic tank was completed. The total cost of relocating the house was

$24,367.74 for which Leland submitted a claim under his flood insurance policy. The claim was denied and this action followed.

II. THE INSURANCE COVERAGE

Leland's insurance policy, at the time of issue and at the time he moved his house in November 1987, was subject to the terms of the SFIP which contained the following provision:

> We only provide coverage for direct physical loss by or from flood which means we do not cover:
>
> A. Losses from other casualties, including:
>
> 1. Loss caused by theft, loss of profits, fire, windstorm, wind, explosion, earthquake, land sinkage, land subsidence, landslide, gradual erosion, or any other earth movement except such mudslides (i.e., mudflows) or erosion as is covered under the peril of flood.

44 C.F.R. Part 61, App. A(1), Art. III.

> A "flood" is defined in the policy as:
>
> A. A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> 1. The overflow of inland or tidal waters. . . .

> B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the cyclical levels which result in flooding as defined in A-1 above.

44 C.F.R. Part 61, App. A(1), Art. II.

Coverage under the Act was expanded by the passage of the Upton-Jones Amendment (the Amendment), codified at 42 U.S.C.A. § 4013(c), which became effective on 5 February 1988. That amendment provides, in part, as follows:

> (1) If any structure covered by a contract for flood insurance under this subchapter and located on land that is along the shore of a lake or other body of water is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, the Director shall (following final determination by the Director that the claim is in compliance with regulations developed pursuant to paragraph (6)(A) pay amounts under such flood insurance contract for proper demolition or relocation . . .
>
> (4)(A) The provisions of this subsection shall apply to contracts for flood insurance under this title that are in effect on, or entered into after, February 5, 1988. . . .
>
> (C) The provisions of this subsection shall not apply to any structure unless the structure is covered by a contract for flood insurance under this subchapter--

(i) on or before June 1, 1988;

(ii) for a period of 2 years prior to certification under paragraph (1);

(iii) for the term of ownership if less than 2 years. . . .

(6)(A) The Director shall promulgate regulations and guidelines to implement the provisions of this subsection.

(B) Prior to issuance of regulations regarding the State and local certifications pursuant to paragraph (1), all provisions of this subsection shall apply to any structure which is determined by the Director--

(i) to otherwise meet the requirements of this subsection; and

(ii) to have been condemned by a State or local authority and to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels.

III. CONTENTIONS

Plaintiff contends that he relocated his dwelling because it had been condemned and was "subject to imminent collapse or subsidence as a result of erosion or undermining caused by [flooding]," thus entitling him to coverage under the

Amendment. Both defendants contend that the Amendment does not apply to this action and that under the terms of the SFIP plaintiff has not suffered a compensable loss. In addition, USAA contends that plaintiff's policy of insurance was canceled effective 30 November 1987 so that he had no coverage on the date of his alleged loss in February 1988. Finally, plaintiff argues that his decision to relocate the dwelling saved the government some $60,000 because he would have been able to recover the full amount of his coverage--some $86,000--had he done nothing and allowed the dwelling to fall into the sea.

IV. DISCUSSION

It is quite evidence that plaintiff has not suffered a "loss" within the meaning of the SFIP as it existed prior to the amendment. Plaintiff does not argue otherwise. Rather, he contends that the Amendment is retroactive or, in the alternative, that is "loss" did not occur until after the Amendment became effective. Neither argument is convincing.

Section 4013(c)(4)(A) provides that "[t]he provisions of this subsection shall apply to contracts for flood insurance under this title that are in effect on, or entered into after, February 5, 1988." In spite of the fact that retroactivity is not mentioned, plaintiff contends that the "clear wording" of the statute, and in particular the words "in effect on," mandate a

construction of retroactivity. The opposite is true. The clear meaning of the provision is that it applies to policies in effect on 5 February 1988, and those issued thereafter, without the necessity of those policies being amended to reflect the new statutory language. Otherwise, it would have been necessary to issue riders or amendments to policies issued before the new language was incorporated into the standard policy form.

Even though this is a government program the rights of plaintiff must be determined the same as any other policyholder of insurance, under the policy itself. Thus, the event triggering plaintiff's right to recovery--his loss--must have occurred during the time that the policy was in effect. Had Congress intended the provisions of the Amendment to apply to losses that occurred prior to 5 February 1988 it would have so provided. Under plaintiff's construction of the Amendment, it would have presumably afforded coverage to him as far back as 1985 when the three-year policy was first issued.

Plaintiff contends that even if the Amendment is not given retroactive effect he is still entitled to recover as his "loss" was not complete until 8 February 1988, three days after the effective date of the Amendment, when his septic tank was completed. The court does not agree.

Congress, in passing the Amendment, specified the two events which would entitle a policyholder to compensation: (1) certification by an "appropriate State or local land use authority" that the covered structure is "subject to imminent

collapse or subsidence" as a result of flooding, and (2) a determination by the Director that the claim is in compliance with regulations to be adopted. 42 U.S.C. § 4013 (c)(1). It seems clear to the court that Congress anticipated that these events would occur before the relocation (or demolition) of the property would take place. Recognizing that it would take some time to implement regulations, Congress provided that in the interim the Amendment would apply to structures "which otherwise meet the requirements of this subsection" and "have been condemned by a State or local authority" and are "subject to imminent collapse or subsidence" as a result of flooding. 42 U.S.C. § 4013(c)(6)(B).

Plaintiff must seek relief under this interim provision. And, of course, he cannot quality for at least two reasons:

(1) His property has never been condemned by a State or local authority. Even though officials of the Town of Topsail Beach informed plaintiff that the dwelling was unfit for human habitation and even though condemnation proceedings were begun in the Spring of 1988, the proceedings were never completed.

(2) There was no determination that the structure was "subject to imminent collapse" by the Director of his designee. It simply defies logic that Congress would have expected this determination to have been made after the dwelling had been moved.

Finally, plaintiff may very well be correct in asserting that his actions saved the government several thousand dollars that might have been paid out under the policy had the dwelling collapsed into the sea. However, as the Government points out, in order to recover for a loss plaintiff would have had to prove that the loss was caused by flood as that term is defined in the policy, a fact which the government does not concede. More importantly, however, is the fact that this is not an action in equity. Plaintiff must recover, if at all, under the terms of the policy of insurance.

V. CONCLUSION

The motion by plaintiff for summary judgment is denied. The motions by defendants for summary judgment are allowed and this action is hereby dismissed.

This 22nd day of March, 1990.

S/
W. EARL BRITT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

EDWIN S. LELAND

Plaintiff,

CASE NO.
88-120-CIV-7-BR

v.

FEDERAL INSURANCE
ADMINISTRATOR & UNITED
SERVICES AUTOMOBILE ASSOC.

AMENDED COMPLAINT

[FILED JANUARY 12, 1989]

Plaintiff complaining of defendants alleges and says:

1. Plaintiff is a resident of Annandale, Fairfax County, Virginia, and at all times complained of herein was the owner of a residence located at Topsail Beach, North Carolina and insured pursuant to the National Flood Insurance Program.

2. Defendant ("Administrator") is the director of an agency of the United States Government, charged with the responsibility of administering the National Flood Insurance Act of 1968 (42 U.S.C. § 4001, et. seq.). The Administrator is made a defendant in this action pursuant to 44 CFR § 62.22. Jurisdiction over this defendant arises under 42 U.S.C. § 4072.

3. Defendant United States Services Automobile Association ("USAA") is an insurance company authorized to issue a standard flood insurance policy pursuant to the National Flood Insurance Write-Your-Own Program. Jurisdiction over this defendant arises under 42 U.S.C. § 4503.

4. On or about March 23, 1985, USAA, pursuant to the National Flood Insurance Write-Your-Own Program, issued to plaintiff policy no. 002-37-71-90F, for a term of three years. The policy insured plaintiff's residence located at 1505 Ocean Boulevard, Topsail Beach, North Carolina. This policy continued in full force and effect at all relevant times, all premiums have been paid when due, and plaintiff has complied with all of its terms and conditions.

5. On December 2, 1986, January 1, 1987, and February 27, 1987, three severe storms occurred on the coast of North Carolina, including the area of Topsail Beach. High winds, waves, and tides resulted in a general and temporary condition of inundation of plaintiff's normally dry dwelling at Topsail Beach. These incidences of flooding were accompanied by collapse and subsidence of plaintiff's land along the shore of the Atlantic Ocean, on which his property was located, as a result of erosion and undermining caused by waves and currents exceeding the anticipated cyclical levels of the Atlantic Ocean. All of these occurrences constituted floods as defined in the insurance policy in suit. As a result of each

of these floods, plaintiff's residence at Topsail Beach sustained considerable damage.

6. Plaintiff's residence was rendered uninhabitable as a result of these floods. On March 17, 1987 the Topsail Beach building inspector notified plaintiff that the residence was unfit for human habitation and was to be condemned.

7. On November 16, 1987, plaintiff relocated the residence from 1505 Ocean Boulevard, Topsail Beach, North Carolina, to its present location at 1506 Ocean Boulevard in order to prevent an imminent collapse caused by the storms and flooding referred to above.

8. On April 2, 1988, plaintiff filed a timely and proper proof of loss in connection with the movement of the house to 1506 Ocean Boulevard. On or about July 5, 1988, defendant Administrator wrongfully denied plaintiff's claim for losses incurred as a result of the floods experienced on December 2, 1986, January 1, 1987, and February 27, 1987. Defendants have refused to pay plaintiff for such losses despite demand for same and, have therefore, breached their obligations to plaintiff under the insurance policy in suit and the National Flood Insurance Act.

9. As a result of the floods on December 2, 1986, January 1, 1987, and February 27, 1987, plaintiff sustained damage in excess of $10,000, which he is entitled to recover of defendant Administrator or defendant USAA pursuant to the insurance policy in suit and the National Flood Insurance Act.

WHEREFORE, plaintiff respectfully prays the court that:

1. Plaintiff have and recover of defendant Administrator or defendant USAA a sum in excess of $10,000 under the insurance policy in suit, with interest thereon at the maximum legal rate from the respective date of each flood loss;

2. Plaintiff have and recover of defendant Administrator or defendant USAA the costs of this action, including reasonable attorney's fees;

3. This action be tried by a jury; and

4. The court grant such further and other relief as shall be just and proper.

This 11th day of January, 1989.

s/
G. Gray Wilson

s/
Richard G. Gwizdz
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

EDWIN S. LELAND

Plaintiff,

CASE NO.
88-120-CIV-7-BR

v.

FEDERAL INSURANCE
ADMINISTRATOR & UNITED
SERVICES AUTOMOBILE ASSOC.

AFFIDAVIT

[FILED DECEMBER 6, 1989]

The undersigned, being duly sworn, deposes and says:

I am Edwin S. Leland, a retired colonel in the United States Air Force and the plaintiff in the above-captioned matter. I am the owner of a residential dwelling formerly located at 1505 Ocean Boulevard, Topsail Beach , North Carolina. I am also the owner of a standard flood insurance policy (formerly policy FL1-0360-6357-4, later changed to policy no. 002-37-71-90F) issued for this dwelling pursuant to the National Flood Insurance Program. On March 23, 1985, I renewed the subject flood insurance policy for a period of three years. The premium of $842.00 for the three-year term

was paid in full at that time. On December 2, 1986, January 1, 1987, and February 27, 1987, violent and unusual winter storms damaged my property, causing major problems to the heating and electrical system, the foundation pilings, the deck and the septic tank. The support pilings of the house were eroded and underwashed by flooding. On March 17, 1987, I was informed by the Town of Topsail Beach that condemnation proceedings had been initiated against the property because, as a result of the storms, the property no longer met the standards required by law. The town stated the property was unfit for human habitation in that, among other things, the septic tank was no longer usable. The electrical system was damaged, and the support pilings were underwashed by tidal action. In early November 1987, the city manager of Topsail Beach declared that my residence was in danger of imminent collapse. On November 16, 1987, I commenced relocation of the property from its location at 1505 Ocean Boulevard to its current location across the street at 1506 Ocean Boulevard. This move was completed on February 8, 1988 with the installation of a new septic tank system. The total cost associated with relocating my house was $24,367.74. I submitted a claim for reimbursement of these expenses shortly thereafter. That claim was denied by the Federal Insurance Administrator on July 5, 1988.

This the 29th day of November, 1989.

S/
Edwin S. Leland

SWORN TO AND SUBSCRIBED
Before me this 29th day
of November, 1989.

S/
Notary Public

My Commission Expires:

October 28, 1991

42 U.S.C.A. § 4013(c) (West Supp. 1991).

(1) If any structure covered by a contract for flood insurance under this subchapter and located on land that is along the shore of a lake or other body of water is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, the Director shall (following final determination by the Director that the claim is in compliance with regulations developed pursuant to paragraph (6)(A)) pay amounts under such flood insurance contract for proper demolition or relocation as follows:

(A) For proper demolition ---

(i) Following final determination by the Director, 40 percent of the value of the structure; and

(ii) Following demolition of the structure (including removal of any septic containment system) prior to collapse, the remaining 60 percent of the value of the structure and 10 percent of the value of the structure, or the actual cost of

demolition, whichever amount is less.

(B) For proper relocation (including removal of any septic containment system) if the owner chooses to relocate the structure ---

(i) following final determination by the Director, prior to collapse, up to 40 percent of the value of the structure;

(ii) the total payment under this subparagraph shall not exceed the actual cost of relocation.

(2) If any structure subject to a final determination under paragraph (1) collapses or subsides before the owner demolishes or relocates the structure and the Director determines that the owner has failed to take reasonable and prudent action to demolish or relocate the structure, the Director shall not pay more than the amount provided in subparagraph (A)(i) with respect to the structure.

(3) For purposes of paying flood insurance pursuant to this subsection, the value of a structure shall be whichever of the following is lowest:

(A) The fair market value of a comparable structure that is not subject to imminent collapse or subsidence.

(B) The price paid for the structure and any improvement to the structure, as adjusted for inflation in accordance with an index determined by the Director to be appropriate.

(C) The value of the structure under flood insurance contract issued pursuant to this title.

(4) (A) The provisions of this subsection shall apply to contracts for flood insurance under this title that are in effect on, or entered into after, February 5, 1988.

(B) The provisions of this subsection shall apply to any structure not subject to a contract for flood insurance under this title on the date of a certification under paragraph (1).

(C) The provisions of this subsection shall not apply to any structure unless the structure is covered by a contract for flood insurance under this subchapter ---

(i) on or before June 1, 1988;

(ii) for a period of 2 years prior to certification under paragraph (1); or

(iii) for the term of ownership if less than 2 years.

(D) The provisions of this subsection shall not apply to any structure

located in the area west of the groin field on the barrier island from Moriches Inlet to Shinnecock Inlet on the southern shore of Long Island of Suffolk County, New York.

(5) For any parcel of land on which a structure is subject to a final determination under paragraph (1), no subsequent flood insurance coverage under this subchapter or assistance under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121, et seq.] (except emergency assistance essential to save lives and protect property, public health and safety) shall be available for ---

(A) any structure consisting of one to four dwelling units which is constructed or relocated at a point seaward of the 30-year erosion setback; or

(B) any other structure which is constructed or relocated at a point seaward of the 60-year erosion setback.

(6) (A) The Director shall promulgate regulations and guidelines to implement the provisions of this subsection.

(B) Prior to issuance of regulations regarding the State and local certifications pursuant to paragraph (1), all provisions of this subsection

shall apply to any structure which is determined by the Director ---

(i) to otherwise meet the requirements of this subsection; and

(ii) to have been condemned by a State or local authority and to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels.

(7) No payments under the subsection may be made after September 30, 1989, except pursuant to a commitment made on or before such date.

(2)

No. 91-318

In the Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN S. LELAND, PETITIONER

v.

FEDERAL INSURANCE ADMINISTRATOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Upton-Jones Amendment to the National Flood Insurance Program, which provides coverage for the costs of relocating structures threatened by floods, applies retroactively to losses occurring prior to the amendment's effective date.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-318

EDWIN S. LELAND, PETITIONER

v.

FEDERAL INSURANCE ADMINISTRATOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 934 F.2d 524. The opinion of the district court (Pet. App. A22-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1991. The petition for a writ of certiorari was filed on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The purposes of the National Flood Insurance Program, see 42 U.S.C. 4001 *et seq.*, include provid-

ing otherwise unavailable flood insurance protection to property owners in flood-prone areas. Owners purchase their policies from private insurance companies. The scope of the coverage, however, is prescribed by federal law, including a Standard Flood Insurance Policy (SFIP) set forth in 44 C.F.R. Pt. 61, App. A(1). The federal government provides financial support for the program.

During the period relevant to this case, the SFIP did not provide coverage for relocation costs—*i.e.*, the costs of moving buildings that are threatened by flooding. In 1988, however, Congress enacted the Upton-Jones Amendment, 42 U.S.C. 4013(c). Subject to various limitations and conditions, that amendment provides for reimbursement of the costs of relocating or demolishing structures, as follows (42 U.S.C. 4013(c)(1)):

> If any structure covered by a contract for flood insurance under this subchapter and located on land that is along the shore of a lake or other body of water is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, the Director [of the Federal Emergency Management Agency] shall (following final determination by the Director that the claim is in compliance with regulations developed pursuant to paragraph (6)(A)) pay amounts under such flood insurance contract for proper demolition or relocation * * *.

The amendment's effective date was February 5, 1988.

2. Petitioner is the owner of a beachfront residence in Topsail Beach, North Carolina. In March 1985, petitioner purchased a standard flood insurance policy from respondent United Services Automobile Association (USAA). The policy term was three years. As issued, the policy did not cover the physical relocation of a dwelling which had sustained structural damage due to flooding. Pet. App. A3-A4.

On December 2, 1986, January 1, 1987, and February 27, 1987, severe winter storms struck the coast of North Carolina, including the Topsail Beach area. Petitioner contends that the storms constituted "floods" within the meaning of his policy and that they caused substantial damage to his residence. On March 17, 1987, officials of Topsail Beach advised petitioner that his residence was unfit for human habitation and that condemnation proceedings were being initiated. In November 1987, city officials warned petitioner that the residence was in danger of imminent collapse. Pet. App. A4-A6.

Petitioner then relocated his residence to a lot farther from the beachfront. The physical relocation of the dwelling was complete in November 1987, several months before the effective date of the Upton-Jones Amendment. The residence was ready for occupancy when the septic tank was installed and approved on February 8, 1988, three days after the amendment's effective date. Pet. App. A6.

After relocation of his residence, petitioner submitted a claim for relocation costs of $24,367.74 to the Federal Energy Management Agency, the agency that administers the National Flood Insurance Program. The claim was denied on the grounds, *inter alia*, that relocation of the dwelling was not compensable under the standard flood insurance policy

held by petitioner at the time of loss and that the Upton-Jones Amendment does not apply retroactively. Pet. App. A6.

3. Petitioner then filed this action against the Federal Insurance Administrator (the FEMA official responsible for the flood insurance program) and USAA. While he conceded that his flood insurance policy, in the form in which it was issued, did not cover relocation costs (see Pet. App. A7), petitioner argued that he was entitled to coverage under the Upton-Jones Amendment. The district court granted summary judgment in favor of the Administrator and USAA. The court held that the Upton-Jones Amendment does not apply retroactively to losses occurring before its effective date, and it rejected petitioner's contention that the loss was covered in any event because it was not complete until February 8, 1988, when his septic tank was finished. *Id.* at A29-A32.

4. The court of appeals affirmed, relying on the "fundamental and well established principle of law * * * that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation." Pet. App. A10. The court rejected petitioner's contention that 42 U.S.C. 4013(c)(4)(A)—which provides that "[t]he provisions of this subsection shall apply to contracts for flood insurance under this chapter that are in effect on, or entered into after, February 5, 1988"—warranted a departure from that general rule. The purpose of Section 4013(c)(4)(A), the court found, was merely to "provide[] for application of the amendment to those standard flood policies which were in effect on the date of the amendment's enactment on February 5, 1988, and to those issued thereafter, without the necessity of amending such policies

to reflect the new statutory coverage." Pet. App. A11.

The court found further support for its conclusion in cases construing the SFIP's "liberalization clause," which provides existing policyholders with the benefit of any favorable changes to the standard coverage. Under those decisions, the court of appeals noted, the liberalization clause "does not give retroactive effect to new SFIP terms; rather, it serves as a device for automatically reading into existing policies beneficial changes as soon as FEMA makes them and declares them to be in force." Pet. App. A12 (quoting *Criger* v. *Becton*, 902 F.2d 1348, 1352 (8th Cir. 1990)). The court held that "an intent for retroactive application of the [Upton-Jones Amendment] is discernable from neither the language of the amendment itself nor from any other indication of congressional intent." Pet. App. A15.

The court also rejected petitioner's contention that his loss was not complete until February 8, 1988, when the septic tank at the relocated residence was completed and the dwelling was approved for occupancy. The court noted that a number of decisions have recognized a "loss-in-progress" principle—embodied in a clause in petitioner's own policy—under which federal flood insurance is held not to apply to flooding that commences before the beginning of the policy term. Pet. App. A18-A19. The rationale underlying that principle, the court reasoned, logically applies to statutory amendments broadening coverage during the term of a policy. *Id.* at A20.

ARGUMENT

The court of appeals' conclusion that the Upton-Jones Amendment does not apply retroactively is well-founded. As petitioner recognizes (Pet. 6), the decision in this case is the only one addressing the retrospective application of that provision. Because the question presented by the petition can arise only with respect to losses occurring prior to February 5, 1988, it has no continuing significance. Further review is not warranted.

The court of appeals correctly identified the general principle that governs this case. Pet. App. A13-A14. "Retroactivity is not favored in the law. Thus, congressional enactments * * * will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988). See *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 834 (1990); *Bennett* v. *New Jersey*, 470 U.S. 632, 639 (1985); *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928).[1]

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[1] The amendment at issue in this case defines substantive rights and liabilities—specifically, the extent of the risk assumed under flood insurance policies. Thus, this case does not present the issue debated by Members of this Court in *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, *supra*. That case, like *Bradley* v. *School Board*, 416 U.S. 696 (1974), concerned the retroactivity of a statutory provision authorizing courts to award certain relief. The retroactive application of such provisions to pending lawsuits is an issue very different from the retroactive extension of an insurance policy. See *Bennett* v. *New Jersey*, 470 U.S. at 639-640.

There is no merit to petitioner's contention that 42 U.S.C. 4013(c)(4)(A) mandates retroactive application of the amendment. That provision states that the Upton-Jones Amendment "shall apply to contracts for flood insurance under this chapter that are in effect on, or entered into after, February 5, 1988." As both the district court and the court of appeals recognized, however, Section 4013(c)(4)(A)'s self-evident purpose was to make the amendment immediately effective without a corresponding amendment to the SFIP or regulations establishing the scope of standard flood-insurance coverage. Pet. App. A11, A29-A30.[2] There is no indication that Congress intended, in addition, to make the broadened coverage applicable to losses that had previously materialized.[3]

The court of appeals' decision is consistent with other cases addressing an analogous issue. *Criger* v. *Becton, supra; Wright* v. *Director, Federal Emergency Management Agency*, 913 F.2d 1566, 1569-1574 (11th Cir. 1990). In those cases, the courts refused to give retroactive effect to a change in the

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[2] The excerpt from the conference report on which petitioner relies (Pet. 8) simply paraphrases the language of the statute. H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 236-237 (1987).

[3] Indeed, under petitioner's view, the availability of coverage conferred by the amendment would turn on a fortuity. Suppose that two neighbors were continuously insured under a succession of three-year flood insurance policies and that both had insurance policies in effect on February 5, 1988, but that the dates on which they had renewed those policies were different. Under petitioner's view, the Upton-Jones Amendment would relate back farther for one insured than for the other. There is no reason to suppose that Congress intended to distinguish between insureds on that basis.

SFIP that narrowed an exclusion in standard flood insurance coverage.

Petitioner argues (Pet. 9) that retroactive application of the Upton-Jones Amendment would be consistent with its policy of encouraging owners of property threatened by flooding to salvage some portion of its value. The scheme that Congress selected to advance that policy, however, includes several elements, not all of which can readily be applied retroactively. The Upton-Jones Amendment confers coverage for relocation and demolition costs, but makes that coverage contingent upon certain determinations and limits the insured's recovery to a fixed percentage of the property's value. Significantly, if it is determined that an owner whose property is subject to the amendment has failed to take appropriate action to relocate or demolish the property, coverage may be limited to the amount that would have been provided had he acted reasonably. Viewed as a whole, that scheme has all the earmarks of a program intended to apply only prospectively. In any event, there is nothing that might rebut the presumption against retroactive application.

As both lower courts held, payment of petitioner's relocation costs cannot be justified on the theory that some portion of his loss occurred after the effective date of the Upton-Jones Amendment. The only event that postdated the amendment's effective date was the completion of the new septic system for the relocated dwelling. The damage that prompted the relocation all predated the effective date of the Upton-Jones Amendment; by that date, petitioner's loss had long since ceased to be an insurable risk. Petitioner's suggestion that the timing of a loss should be tied to the completion of measures to repair or miti-

gate flood damage would give insureds power over the availability of insurance coverage.

Courts have consistently denied coverage under the National Flood Insurance Program for losses caused by flooding that commences prior to the effective date of a policy. See *Mason Drug Co.* v. *Harris*, 597 F.2d 886, 887-888 (5th Cir. 1979); *Summers* v. *Harris*, 573 F.2d 869 (5th Cir. 1978); *Drewett* v. *Aetna Casualty & Surety Co.*, 539 F.2d 496, 498 (5th Cir. 1976). The principle underlying those decisions—that insurers may not be deemed to have assumed the risk of a loss that has already materialized by the time they issue coverage—applies to extensions of coverage occurring during the policy term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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